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# Public Policy and International Commercial Arbitration: The Argentine Perspective

Horacio A. GRIGERA NAÓN \*

## I. PUBLIC POLICY UNDER ARGENTINE LAW

### A. *Distinction between "strict" and "attenuated" Public Policy Area*

Under Argentine Law, public policy is currently considered to be a synonym of mandatory rules and principles whose application cannot be avoided by the will of the parties, nor can the latter waive or relinquish in any way the application of public policy provisions (arts. 18, 19, 21, 872 *Argentine Civil Code*, hereinafter referred to as CC).<sup>1</sup>

Nevertheless, the foregoing statement can be qualified at least in two ways:

(i) Already at the level of Argentine internal substantive law, one should distinguish between "strict" and "attenuated" public policy norms. Only the first category rigorously corresponds to the notion of public policy we have so far submitted, because though the application of "attenuated" public policy norms cannot be waived or relinquished by the parties *ab initio* or at the moment of contracting, the parties are always individually allowed (and this is the key difference with "strict" public policy norms) to relinquish any rights or patrimonial benefits derived therefrom once they have been acquired or have accrued during or as a result, for instance, of a contractual relationship.

Of course, both "strict" and "attenuated" public policy provisions play a protective role in response to certain policies, interests and values cherished by the national community at large. However, the latter, at least at a certain stage,

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<sup>1</sup> G. Borda, I Parte General, *Tratado de Derecho Civil*, n. 45/48; 62/66 (1976).

is rather aimed at safeguarding individuals from specific dangers menacing them than at protecting society itself from evils which can be prejudicial to society as a totality or to any of its significant sectors. This explains why a violation of “attenuated” public policy provisions can lead to certain specific effects—for instance, to a relative nullity subject to confirmation by the party entitled to invoke it—which differ from those arising when a “strict” public policy norm is infringed (such as the absolute and inescapable nullity for all parties involved of the act contrary to “strict” public policy).<sup>2</sup>

Statute of limitations provisions are a characteristic example of “attenuated” public policy under Argentine law. The parties are prevented from anticipatedly waiving or modifying statute of limitation provisions or terms but can freely waive any benefits or defenses acquired under already elapsed statute of limitations terms. Two different grounds explain this nuanced treatment: a) at the moment of contracting, the weaker party is more likely to be at the mercy of compulsory measures or menaces from the party having the stronger bargaining position for obtaining the waiver of future defenses such as an eventual invocation of statute of limitation provisions; b) the main purpose of statute of limitation provisions is to enhance security and certainty in general societal relationships and particularly in commercial and business transactions by reducing any possibility of surprising the parties by a belated and unexpected challenge of contractual relationships.<sup>3</sup> This is a concern clearly connected with the protection of general societal interests: the stability and predictability of transactions leading to the development and betterment of commercial and economic relations and of the general economy of the nation. Nevertheless, the furtherance of such general values is no longer menaced when in a specific transaction, one of the parties waives benefits derived from a statute of limitations which has already elapsed to his advantage.

(ii) According to certain opinions, there is no necessary identity in Argentine law between public policy norms and imperative norms. A norm is to be deemed mandatory either because the legislator defines it as such or because a specific norm or the general legislated area covered in part by it is considered by the legislator as a public policy one. Therefore, there are imperative norms which nevertheless cannot be considered public policy ones.<sup>4</sup> Norms which owe their imperative character to the specific wishes of the legislator rather than to their having been labelled as public policy norms are

<sup>2</sup> J. Ghestin, *Traité de Droit Civil, Les Obligations, Le Contrat*, n. 778, 667 & fol. (1980).

<sup>3</sup> J. Llambías, II Parte General, *Tratado de Derecho Civil*, n. 2100, 672 (1978).

<sup>4</sup> R. Budano Roig, *Imperatividad y Orden Público*, 116 *El Derecho*, n. 6384, 8 & fol., December 13 (1985).

more likely to be aimed at protecting specific individual situations than at safeguarding general societal interests. Judges are expected to apply them to the extent and in the way desired by the legislator.<sup>5</sup>

### *B. Public Policy Norms and Mandatory Norms*

However, judges can modify the mandatory nature of norms falling under the public policy category by denying the public policy nature ascribed to them by the legislator. In this sense, it has been contended both by Argentine doctrine and court decisions that it will not suffice that the legislator dogmatically encompasses a legal norm within the public policy characterization if there is no further underlying societal interest or policy which can be considered to the eyes of the judge as a public policy one. To this end, the judge is free to evaluate the nature of the legal provision concerned, the subject-matter falling under its purview, the reasons or aims pursued by it, the interests and community values, including common welfare and development concerns, to be protected or advanced by such rules.<sup>6</sup>

In other words, a legal rule not considered by the legislator as a public policy one can be turned into such by the courts; and *viceversa*, the legislative characterization of public policy norms is not necessarily binding on the courts if they find that there are no grounds therefore. It is furthermore interesting to notice that this attitude of Argentine courts is linked to their refusal to accept broad, abstract and all-encompassing definitions of public policy through general legal rules. Apparently, Argentine judges feel more inclined to determine the public policy nature of legal norms on a case-by-case, issue-by-issue, *ad hoc* basis by taking into account the societal interests and policies underlying any such rules in view of the specific subject-matter and dispute at stake.<sup>7</sup>

Though we fully understand that courts should be able within certain limitations rooted in constitutional law provisions to turn otherwise suppletive legal rules into mandatory ones as a result of changing public policy notions, we still feel reluctant to accept that a court is to have more extended powers to revise the imperative character of legal norms when general societal interests are concerned than when merely the protection of the individual is affected. The opposite seems to be much more advisable, specially in a Continental Law system where it normally corresponds to the legislative bodies to define the areas of public interest to be particularly protected under the laws and the scope

<sup>5</sup> J. Llambías, *I Código Civil Anotado*, 54 (1978).

<sup>6</sup> A. Belluscio, *I Código Civil y Leyes Complementarias*, 108 (1979).

<sup>7</sup> *Id.*, 108/109.

of that protection. An interference by the courts in the role of the legislator in this respect can be therefore questioned from the angle of its lack of compatibility with the constitution unless the legislator has exercised his powers in violation of constitutional guarantees.

On the other hand, only formalistic reasons can explain the strict categorization between mandatory norms of public policy nature and imperative norms *per se*. All imperative norms reflect the desire of the legislator of furthering interests which society wishes to protect; therefore, there is no reason to introduce discriminatory *criteria* for establishing their mandatory effects. In this sense, freedom of contracting and private autonomy themselves are public policy principles grounded on societal interests wider than those of any of the parties involved in any particular transaction invoking them. The same can be said of provisions aimed at protecting weaker parties, which can be both viewed in terms of social justice and of preventing abuses against one of the parties in the particular case.<sup>8</sup> It does not matter that the effects of the declaration of nullity of a transaction will vary between cases where the protection of individuals is more significantly concerned and those where broader societal or community concerns are involved (in the latter hypothesis, ratification of the act attacked on nullity grounds, available to the party protected by nullity provisions in the former case where the attacked act is merely voidable, is not allowed); such difference in treatment does not suffice for conferring broader powers on the judge for deciding on the mandatory effects of legal rules which irrespective of the characterization made by the legislator, were intended to be imperatively observed by both the individuals and the courts.

For us, then, all imperative laws and principles are public policy norms, and *viceversa*, all that is characterized either by the judge or the legislator as belonging to the sphere of public policy is to be mandatorily enforced. In consequence, whatever external forms have been chosen for imposing the planning principle<sup>9</sup> over the will of the individuals, they all require identical allegiance.

In our opinion, the Argentine judge is both entitled to (a) within certain constitutional law limits, allocate public policy nature to legal norms not originally qualified as such or not invested with imperative effects by the legislator,<sup>10</sup> but not to deprive of mandatory nature legal norms which have

<sup>8</sup> J. Llambías, I Parte General, *Tratado de Derecho Civil*, n. 188, 160 (1978).

<sup>9</sup> A. T. von Mehren, *A general view of Contract*, Ch. 1, *VII International Encyclopedia of Comparative Law*, 10 & fol. (1982).

<sup>10</sup> J. Ghestin, *L'ordre public, notion à contenu variable en droit français*, *Les Notions à Contenu Variable en Droit*, 78/81 (1984), clearly shows that this is a necessary outcome of the continuous

been labelled by the legislator as public policy ones without any violation of constitutional guarantees; and (b) to pronounce himself on the *sphere of application* of public policy and imperative norms, thereby indirectly affecting their imperative scope by including in or excluding from their range specific legal relationships.

The operation referred to at (b) would fall within the constitutional powers of judges of interpreting and applying the law in face of the particular controverted issue at stake, by taking into account the purpose of legal provisions and the interests and policies underlying them, as well as the more general legal principles—themselves reflecting wider interests and policies—pertaining to the whole juristic system or to the specific legal area affected by the dispute.<sup>11</sup> As a consequence, the already criticized apparently excessive powers exercised by Argentine judges for denying public policy nature granted by the legislator to specific legal norms become perfectly valid and appropriate when aimed at defining the area of application of public policy norms, and in our view, of imperative or mandatory norms at large. Therefore, the scope of application of such norms is determined rather by taking into account the particularities of the specific case than by blindly abiding by abstract and generally defined notions of public policy deemed to apply *a priori* to a generality of future and unknown cases.<sup>12</sup> As we will further see, this functional way of looking at public policy and imperative norms within strictly local cases has a direct influence on the extraterritorial notion and effects of public policy in the international arena.

## II. INTERNATIONAL PUBLIC POLICY IN ARGENTINE PRIVATE INTERNATIONAL LAW

### A. *Traditional Notion*

Following the general tradition in the field, Argentine private international law contemplates the absolute exclusion of foreign substantive law and legal principles contradictory with Argentine international public policy though their application be designated—even imperatively—by Argentine conflict-of-law rules (art. 14 (2) CC).

evolution and fluctuations of public policy notions, whose changes can be captured either by the legislator or the judge.

<sup>11</sup> See court decisions in this sense at Llambías, *supra* note 4, at 42/43.

<sup>12</sup> See, for instance, National Commercial Court of Appeals “C”, *Domingo Luis v. Kaiser Aluminio S.A.*, 139 La Ley, 801/802 (1970).

Argentine international public policy taken in its strict sense embodies both i) general principles of morality and justice on which the Argentine society is grounded or accepted by the Argentine society; ii) essential principles underlying the Argentine juristic system; iii) essential principles of economic and social public policy safeguarding certain aspects of (a) the protection of the individual participating in economic or labor transactions (*ordre public de protection*) and (b) the economic and social structure of the country as well as of the furtherance of national policies in this area (*ordre public de direction*).<sup>13</sup> Argentine international public policy is also deemed to incorporate public international law principles and *ius cogens* in the measure that they have been or must be deemed incorporated into Argentine law.<sup>14</sup>

### B. Public Policy “Lois de Police” and Laws of Immediate Application

Though not identical with the notion of international public policy, but still close to it because having a bearing on the amount of foreign law an Argentine court will be ready to apply when it is to decide an international dispute, is the growing literature and court decisions in Argentina favoring the unilateral application of originally local or municipal substantive norms to international cases.<sup>15</sup> This will happen, according to our views, when interest and policies underlying a specific substantive rule or principle or evidenced through them would be frustrated if any such rule did receive international application. The latter will not therefore depend on the traditional conflict-of-laws “hard-and-fast” technique of determining the applicable law through the localization of the different connecting factors individually ascribed to the diverse abstract categories where all legal relationships are to be necessarily and respectively inserted: on the contrary, the area of application of each substantive legal rule is to be determined by considering the strength of the interests and policies underlying it in light of the controverted issue and of the

<sup>13</sup> Ghestin, *supra*, note 2, 86 & fol.; 89 & fol.

<sup>14</sup> R. Vinuesa, G. Moncayo, H. Gutiérrez Posse, 1 *Derecho Internacional Público*, 58/71; F. Rigaux, *Les notions à contenu variable en Droit International Privé, Les Notions à Contenu Variable en Droit*, 240/241 (1984).

<sup>15</sup> I. Winizky & H. Grigera Naón, *El art. 30 del Dto. [Ley 19.350 y la actuación internacional de las sociedades comerciales en el ámbito de los Tratados de Montevideo de 1889 y 1940]*, 38 *Revista del Derecho Comercial y de las Obligaciones*, 133 & fol. (1974); H. Grigera Naón, *Les règles de droit limitant leur propre domaine d'application: doctrine comparée et droit argentin; Rechtsvergleichung, Europarecht und Staatenintegration, Gedächtnisschrift für Leontin Constantinesco*, 185 & fol. (1983); A. Boggiano, 1 *Derecho Internacional Privado*, 313 & fol. (1983); on the relevance of the issue-by-issue and policy analysis in international contract law, see D. T. Trautman, *Some notes on the theory of choice-of-law clauses*, 35 *Mercer L. Rev.*, 535 (1984).

connections of the latter with the legal order to which such rule belongs. It is the interaction of all these elements: interests, policies, disputed issue and contacts "creating interests" which is to determine if a *loi de police* exists and is to be applied or not.<sup>16</sup>

The *loi de police* technique differs from the traditional international public policy notion because (i) the policies determining the extraterritorial application of otherwise municipal substantive rules do not respond to general principles abstracted from the whole of the legal system or societal organization or to broad conceptions of morality and justice, but reflect concrete and specific interests and policies which account for the existence of that norm in the legal order or correspond to the field of law to which that norm belongs and (ii) *lois de police* do not seek to exceptionally avoid the otherwise normal application of foreign law, but once their conditions of application are given, they immediately apply to the issue at stake, thereby *ab initio* (a) excluding both the eventual application of foreign laws and of any "indirect" conflict-of-law rules of the legal order to which they belong and (b) simultaneously superseding any choice-of-law made by the parties which would deny application to the *loi de police* concerned.

Very close to *lois de police* are rules of immediate application. The latter are substantive rules whose *ab initio* principal purpose is to directly apply to international transactions pursuant to specific policies established by the legislator.<sup>17</sup> Therefore, unlike *lois de police*, laws of immediate application are not originally local or municipal rules of law which on account of the specific issue at stake require extraterritorial application. Normally, laws of immediate application share the strict mandatory character of *lois de police* and their application cannot be prevented by a contrary choice of law of the parties. Moreover, like *lois de police*, they usually unilaterally and directly govern legal relationships falling within their scope without resorting to the "indirect" or "conflictual" choice-of-law technique; nevertheless, this last aspect is not so clear in certain cases: for instance, art. 14 sec. 4 CC provides that the application of Argentine law is privileged if it conflicts with a foreign law less favorable to the validity of juristic acts, which might suggest that primarily, the applicable law to the transaction is to be determined according to the general "conflictual" choice-of-law method, and only thereafter the application of the foreign substantive law so designated is to be left aside if less favorable than Argentine law to the validity of juristic acts because the latter is to necessarily prevail pursuant to a substantive legislative policy favoring the validity of international

<sup>16</sup> *Allstate Ins. Co. v. Hague*, 449 U.S., 302, 313, S.Ct. 633 (1981).

<sup>17</sup> P. Mayer, *Droit International Privé*, n. 132, 110/111 (1983).



transactions with some contact with Argentina. In cases like this, the “direct” method embodied in laws of immediate application only seems to play a role once the otherwise normally applicable law has been established through the traditional conflictual or “indirect” method.<sup>18</sup>

Any sort of internal substantive public policy rule depicted at Chapter I—“strict” or “attenuated”—can become a *loi de police* as a result of its underlying policies and the issue at stake, probably without altering their original functional properties. Thus, it is most likely that a *loi de police* corresponding to an “attenuated” public policy internal norm will allow the beneficiary of any advantage thereunder to an *ex post facto* relinquishment of rights or benefits which have been already acquired therefrom.

The *loi de police* technique is generally contemplated at art. 14 (1) CC privileging the application of Argentine public law norms over the application of foreign law and art. 1206 CC determining the direct application of Argentine substantive laws to international contracts when so required by the interests of the State or of its inhabitants.

It is true that the notions of public laws and of *lois de police* do not necessarily overlap. In fact, an authorized current of opinion has recently contended that the extraterritorial application of public laws implicating the State as a public law subject or the exercise of sovereign powers pertaining to the State’s “self-organization” is not determined by private international law but is governed by public international law.<sup>19</sup> On the other hand, these opinions also maintain that a number of norms characterized as public law rules are actually “decisions” (most of nationalization provisions would fall under this category) deprived of general and abstract effects, whose creation does not bring about a modification of the legal order so that their area of influence does not exceed the concrete situation to which they are addressed and can only be repealed with retroactive effects.<sup>20</sup> The determination of the extraterritorial effects of decisions would also be excluded from the purview of *lois de police* and conflict-of-laws. It would be based instead on an analysis similar to that leading to that leading to the extraterritorial recognition and enforcement of foreign judgments, so that considerations concerning the existence of jurisdiction and competence of the foreign authority or organ issuing the decision and the latter’s compatibility with the international public policy of the *forum* as well as

<sup>18</sup> H. Grigera Naón, *supra* note 14, at 204/205.

<sup>19</sup> P. Mayer, *La distinction entre règles et décisions en Droit International Privé* (1973); H. Grigera Naón, *Foreign Acts of State before National Courts, International Law and Municipal Law* (Bothe & Vinuesa, Gen. Eds.), 51 & fol. (1982).

<sup>20</sup> Mayer, *id.* at 48 & fol.; Grigera Naón, *id.* at 55.

public international law considerations will be finally decisive in this respect.<sup>21</sup>

It is too premature yet to pretend that these opinions have been echoed by Argentine doctrine and court decisions. Nevertheless, art. 14 (1) CC does not seem to close the door to such ideas and, in any case, though such conceptions be rejected, it certainly authorizes the direct and immediate extraterritorial application of Argentine public laws if they can still be considered on account of their underlying policies and interests as *lois de police* growingly accepted by Argentine doctrine and court decisions or if they can be deemed to be legal rules of immediate application.

### C. Public Policy and “*Fraude à la Loi*” in Argentine Private International Law

Argentine law (like the law of the Federal Republic of Germany)<sup>22</sup> also encompasses within its broad notion of international public policy—clearly exceeding the “strict” notion which we have previously considered—the *fraude à la loi* doctrine. *Fraude à la loi* in the private international law sense refers to any manoeuvres addressed at frustrating the application of the law which should normally apply if the private international law system of the *forum* operated without any artificially created distortions.

To this notion respond arts. 1207 and 1208 CC providing that (i) any contract concluded abroad for evading otherwise applicable Argentine mandatory law or (ii) any contract made in Argentina for evading the application of foreign mandatory law will be rendered null and void. Thus, by condemning both *fraude à la loi propre* et *fraude à la loi étrangère* the Argentine legislator underscores the imperative character of the Argentine private international law and the necessary application, even *ex officio*, of national or foreign mandatory laws designated by the Argentine private international law. Such imperative nature of Argentine private international law becomes then a part of Argentine principles of public policy in the international sense and leads to the *ex officio* application by an Argentine judge of foreign laws designated through Argentine private international law choice-of-law methodologies.

The *fraude à la loi* doctrine in Argentine law has a role to play both with regard to (a) the “conflictual” indirect choice-of-law technique and (b) the direct *loi de police* and “legal rules of immediate application” technique belonging to Argentine private international law.

<sup>21</sup> Mayer, *id.* at 174 & fol.

<sup>22</sup> B. Dickson, *The Reform of Private International Law in Germany*, 34 I.C.L.Q., 242 (1985).

A good example to illustrate how *fraude à la loi* works as to (a) is to be found in the field of choice-of-law for international contracts.

Though there is no reference whatsoever to private autonomy at arts. 1205/1214 CC concerning the law applicable to international contracts, Argentine doctrine seems to concur in that the parties are allowed to choose the applicable law. It remains however to see which are the limits to the freedom of the parties in this respect.

As a matter of fact, arts. 1205/1214 CC only refer to two main connecting factors: the place where the contract has been concluded (art. 1205 CC) and the place where the contract has been or is to be performed (arts. 1209/1214 CC). For some opinions, these provisions only play a suppletive role when the parties have not made any explicit or tacit choice-of-law.<sup>23</sup> How are these two incompatible connecting factors to be then reconciled? Art. 1205 CC would only apply to contracts concluded out of Argentina not having any relevant contact with the Argentine legal order either (i) because they have been concluded and are to be performed abroad but on account of a fortuitous circumstance originate an action which has been filed with an Argentine court or (ii) because though the parties did not specifically designate any place of performance, fortuitous circumstances lead any of them to seek contractual performance in Argentina.<sup>24</sup>

Other opinions—which we tend to prefer—deny all effects to the place of contractual conclusion when that place and the place of contractual performance coincide, a solution coherent with the source of this provision, Story's Conflict-of-Laws.<sup>25</sup> Only when the place of performance at least in part takes place outside of the place of contractual conclusion and a predominant place of performance cannot be determined, not even by subsidiarily referring according to arts. 1212/1213 CC to the domicile of the debtor who is sued under the contract or according to art. 1214 CC (in the case of contracts *inter absentes*) to the respective domicile of the parties, it is then subsidiarily allowed to resort to the contractual place of conclusion for establishing the applicable law.

In our view, then, the place of contractual performance will normally designate in most cases the applicable law. However, we do not believe that arts. 1205/1214 CC apply subsidiarily when there has been no exercise of the

<sup>23</sup> For a description and critical evaluation of these positions, see H. Grigera Naón, *International Contract Law, "lois de police" and self-applicating rules: an Argentine outlook*, 19 *Vorträge, Reden und Berichte aus dem Europa Institut, Universität des Saarlandes*, (1983); by the same author, *Les Contrats Internationaux en Argentine*, 7 D.P.C.I., 427 & fol. (1981).

<sup>24</sup> A. Belluscio (J. C. Smith), *5 Código Civil y Leyes Complementarias*, 1018, 1025 (1984).

<sup>25</sup> V. Romero del Prado, *II Derecho Internacional Privado*, 628 (1961); J. Story, *Commentaries on the Conflict of Laws*, 325 (1883).

private autonomy of the parties for choosing the proper law because there is no indication whatsoever in that sense in such provisions or in the footnotes inserted at the bottom by the author of the *Argentine civil code* himself. It only remains then to accept that such provisions apply even when there has been a choice-of-law operated by the parties; therefore, the mandatory or public policy norms of the contractual place of performance will trace the boundaries within which the substantive rules of law of the legal order chosen by the parties will be allowed to govern their contract and contractual effects derived therefrom.

Nevertheless, in order to assess the true scope of the controlling power of the place of contractual performance over the chosen law it is necessary to clarify what should be understood by *place of performance* and by mandatory rules of the law of the place of performance.

As far as the meaning of *place of performance* is concerned, necessary reference is to be made to the sources of arts. 1209/1214 CC, the works of the German Savigny and of the Brazilian Teixeira de Freitas. Both understand that for determining the applicable law to any legal relationship, its *Sitz* or *siège*, or in other words, its center of gravity, is to be determined. International contracts are not an exception to this. For the German Savigny, there is no applicable law to the contract as a whole but each contractual obligation is to be separately governed by its own law. For determining the applicable law, it is then needed to identify the separate *Sitz* of each obligation, which coincides with its place of performance. It is then the localization of each obligation's place of performance which indicates its applicable law.<sup>26</sup> The Brazilian Freitas goes a step further and speaks in terms of the place of performance of the contract as the center of gravity for determining the law governing contractual effects.<sup>27</sup> Velez Sarsfield, the author of the *Argentine Civil Code*, also refers to the contractual place of performance as the center of gravity for determining the applicable law to all contractual aspects but for formal validity and capacity to contract (the latter are in principle respectively governed by the law where the contract is made (art. 12 CC.) and by the domicile of the contracting parties (arts. 6 and 7 CC).

However, contracts do not have any place of performance; one could at most refer to specific contractual obligations having their corresponding places of performance, and even assuming (as Freitas seems to do) that the *contractual* place of performance coincides with the place of performance of *contractual obligations* emerging from it, it is far from unusual to see that different or the

<sup>26</sup> F. C. v. Savigny, *A treatise on the conflict of laws*, n. 369, 94 & fol., Edinburgh (1880).

<sup>27</sup> A. T. Freitas, *Código Civil*, art. 1962, at 636 (Ed. Roldán, 1909); *III Código Civil* (Esboço), 783, (Rio de Janeiro, Laemmert, 1865).

same contractual obligations are performed in different places so that it becomes impossible to determine (unless an aprioristic determination of a characteristic obligation and its corresponding place of performance is made)<sup>28</sup> which is the “contractual” proper law. There is furthermore a logical impossibility to follow this approach, because normally, it is the law applicable to the contract as a whole which allows us to learn which are the contractual effects arising therefrom, including the contractual obligations to which it gives birth. We would be putting the cart before the horse if we tried to determine the applicable law to the contract by referring *prima facie* to the place of performance of each such obligations for finding out, for instance, the applicable law determining if the contract exists or is valid as source of such obligations and the qualities and scope of the latter.

Actually, the expression “place of contractual performance” is deprived of specific semantic reference because there is no such thing as a place where contracts are performed and, moreover, a contract is a source of obligations and an organizational framework of different obligational aspects which is something more than the obligations which it creates and coordinates.<sup>29</sup> Therefore, the contract is to have a “place of performance” or center of gravity of its own which can or cannot coincide, according to the circumstances, with the place of performance of contractual obligations. The contractual place of performance cannot be therefore fixed *in abstracto* and for all cases; it is a notion *à contenu variable*<sup>30</sup> to be established on an *ad-hoc*, case-by-case basis corresponding to each different contractual situation.

In contemporary comparative law, this has been achieved by determining the center of gravity of contractual relationships through the grouping of contacts technique, that is, by submitting an international contract to the legal order with which it is most closely connected because it shows more—or at least the most relevant—contacts with the transaction.<sup>31</sup> Normally, a hierarchy in the relevance of the diverse contacts jointly grouped for determining the applicable law (place of performance, place of conclusion, domicile and nationality of the parties, choice of *forum* or arbitral clauses, *inter alia*) is established *a priori* by the

<sup>28</sup> Jessurun d'Oliveira, *Characteristic Obligation in the Draft EEC Convention*, 25 *Am. J. Com. L.*, 303 & fol. (1977); F. Juenger, *The EEC Convention on the Law Applicable to contractual obligations, Contract Conflicts*, North Ed., at 300/302 (1982). The European 1980 Convention itself makes clear that characteristic obligations are just rebuttable presumptions for the contractual closest connection (art. 4).

<sup>29</sup> Grigera Naón, *supra. id.* notes 14 & 22.

<sup>30</sup> Rigaux, *supra* note 13, at. 241.

<sup>31</sup> For the U.S.A. situation, Scoles & Hay, *Conflict of Laws*, 652 & fol. (1982). For the U.K., see Cheshire & North, *Private International Law*, 218 & fol. (1979).

legislator or *ad-hoc* by the judge, so that not all contacts have identical weight in designating the contractual *Sitz*.<sup>32</sup>

#### *D. International Contracts and International Mandatory Rules in Argentina*

It is in this way, then, that the expression “place of performance” in arts. 1209 and fol. CC is to be understood; it will be the contractual localization determined *ad-hoc* by the judge for each contractual relationship through the grouping of contacts process that will enable to establish the contractual applicable law. Only in the very unlikely hypotheses where it will be impossible to determine where the contacts predominantly group themselves will the judge resort to subsidiary “fixed” and “hard and fast” connecting factors individually operating the designation of the applicable law, such as the domicile of the debtor and the place of contractual conclusion (arts. 1205, 1212/1214 CC), though it is to be remarked that at this stage there must already have played a role as contacts in the preliminary (and most probably successful and final) step of the grouping process leading to the *ad-hoc* determination of the “place of performance”.<sup>33</sup>

Nevertheless, the determination of the localization of an international contract through the grouping of contacts procedure is not to necessarily lead under Argentine law to the application of all the substantive rules of the legal order so designated. If such legal order is the Argentine one, for instance, substantive suppletive rules will not govern if their application has been directly set aside by the parties or has indirectly been excluded through their choice of a different and incompatible law. According to certain opinions to which we have already referred, the same would happen to legal rules owing their imperative character to their characterization as local public policy norms in the measure that the judge deciding the international case submitted to him will determine *ad-hoc* that the underlying policies and the issue at stake do not authorize to grant imperative character to a legal norm because there are no (internal) public policy reasons allowing such result.

Those who do not accept such solution will still acknowledge the authority of judges to determine through the interpretation process the scope of applicability of imperative substantive rules at large. As a result, the mere designation of the Argentine legal order as a whole by the contractual localization through grouping of contacts only determines the *prima facie* predominant relevance of the Argentine national substantive legal order for

<sup>32</sup> H. Batiffol & P. Lagarde, *II Droit International Privé*, n. 588 & fol., 290 & fol. (1983).

<sup>33</sup> Grigera Naón, *supra*. *id.* note 22.

regulating the totality of the contractual relationship at stake, but does not necessarily imply the extraterritorial relevance of all and every substantive rule of such order for governing the specifically controverted issue in the instant case.

It is then up to the judge to decide in face of each controverted issue if the policies and interests of the otherwise strictly local substantive norms indicated by the contractual localization ("place of performance") and the wider *forum's* interests and policies implicated by international transactions and international commerce make the latter "wish" to receive extraterritorial application despite their originally exclusive relevance for entirely local transactions. The initial presumption will be that the imperative substantive rules of the "place of performance" apply to international cases and limit choice-of-law autonomy. But such presumption can be rebutted by showing that in face of the concrete dispute to be decided there are no interests and policies requiring the extraterritorial application of originally entirely locally-oriented substantive norms. The "place of performance" as connecting factor acquires then a functional meaning according to which contacts, substantive legal rules of the concerned *forum* and underlying or relevant *forum* policies continuously interact much in the way they do under functional and interest analysis characteristic of U.S.A. conflict-of-laws doctrines.<sup>34</sup>

The utilization by the Argentine judge of functional choice-of-law techniques for determining the best and more fair and just *ad-hoc* choice-of-law solution for the particular case has become more likely after the ratification by Argentina of the *Inter-American Convention on General Rules of Private International Law*, whose article 9 textually provides the following:

"The different laws that may be applicable to *various aspects* of one and the same juridical relationship shall be applied harmoniously *in order to attain the purposes pursued by each of such laws*. Any difficulties that may be caused by this simultaneous application shall be resolved *in the light of the requirements of justice in each specific case*."<sup>35</sup>

Thus, the notions of issue-by-issue analysis or "depeçage" and of policies underlying the substantive rules at stake, as well as the concern for finding the most just solution for each dispute are contemplated by this provision.

As a consequence, the Argentine judge is to be deemed able to limit the scope of application of municipal mandatory norms of only parochial significance even if the legal system to which such norms belong is designated

<sup>34</sup> *Id.*; Trautman, *supra. id.* note 14; Scoles & Hay, *supra. id.* note 30.

<sup>35</sup> See OAS Serie sobre Tratados n. 54, OEA/Ser. A/31 (SEPF), 5 & fol. (1979); Argentine ratification took place through law 22.921 of 1983.

by the contractual “place of performance”. If the parties have chosen the application of a different legal order incompatible with such norms, no *fraude à la loi* can ensue because the judge will have decided that the latter, though imperative, do not apply to the international case at stake. If, on the contrary, the subject-matter of the dispute and the interests and policies concerned (underlying the relevant substantive rules and the general field of law affected) indicate that such rules require their extraterritorial application in view of the need of reaching the just solution required by each particular case, then, all and every choices-of-law of the parties preventing their application is to be deemed objectively fraudulent in terms of arts. 1208/1209 CC and is to be left aside by the competent court as far as the solution of the controverted issue is concerned.<sup>36</sup>

If we turn now to (b)—the application of the *fraude à la loi doctrine* and *lois de police* or legal rules of immediate application—we are facing a different theoretical and practical context. A *loi de police* or legal rule of immediate application (hereinafter jointly referred to as “direct rules”) applies to an international case ignoring any “conflictual” choice-of-law procedures. As a result, the judge does not investigate first if the direct rule belongs or not to the legal order corresponding to the “place of performance” established through the grouping of contacts method: he only looks at the substantive norm itself, the issue at stake and the underlying interests and policies concerned. If the conditions of application of the direct rule are given, the judge will automatically apply it whatever the “place of performance” determined through the grouping of contacts method will be; if such conditions fail to exist, the direct rule will not apply *even* if the legal order to which it belongs is designated through the grouping of contacts process.

Therefore, no *fraude à la loi* is conceivable if the judge of the legal order to which the direct rule belongs is called to decide the case. Such judge will not even consider the choice-of-law made by the parties or the contractual localization: he will automatically apply his direct rule to the controverted issue. If there is any possible *fraude à la loi* to the direct rule of the judge, it can be only achieved through a choice of *forum*, foreign or arbitral.<sup>37</sup> Courts of the legal order to which direct rules belong often claim exclusive jurisdiction on any controverted issues to which direct rules become applicable. Therefore, any choice-of-forum or arbitral clause granting jurisdiction to adjudicators who will deny the application of the direct rules of the excluded Argentine *forum* will

<sup>36</sup> Grigera Naón, *supra*. *id.* note 22.

<sup>37</sup> This is what is known as *fraude au jugement*, Mayer, *supra* note 16, 379 & fol.; 317 & fol.



be ineffective and fraudulent in terms of art. 1207 CC and as the exclusive jurisdiction of Argentine courts has been evaded (art. 1 National Code of Civil and Commercial Procedure, hereinafter Cpr.),<sup>38</sup> the decisions or awards of the chosen *fora* will not be recognized or enforced by Argentine courts (arts. 517, 519 bis Cpr.).

On the other hand, under art. 1208 CC, an Argentine court will not lend itself to a fraudulent evasion of a foreign direct rule not contradictory with an Argentine direct rule or with Argentine international public policy.<sup>39</sup> In principle, then, an Argentine court is expected to apply foreign direct rules when their conditions of application under the laws of their country of origin are given though such application was sought to be evaded through the choice of the Argentine *forum* or of a third *forum* (this latter can happen when enforcement of the third *forum's* decision or award is sought in Argentina) or through the exercise of the parties' private autonomy for choosing the application law.

### III. PUBLIC POLICY AND INTERNATIONAL COMMERCIAL ARBITRATION: AN ARGENTINE VIEW

This topic is to be analyzed with regard to three different aspects:

- (i) public policy and arbitral proceedings or awards taking place or rendered in Argentina with regard to an international transaction;
- (ii) public policy and invocation of an arbitral agreement regarding an international transaction before Argentine courts for compelling arbitration or for obtaining a stay of court proceedings in Argentina;
- (iii) public policy and recognition or enforcement of foreign arbitral awards in Argentina.

(i) Arbitral proceedings and awards in Argentina have to be compatible with essential principles of fairness and justice which are a part of both Argentine internal and international public policy.<sup>40</sup> For instance, the due process guarantee embodied in article 18 of the Argentine Constitution requires

<sup>38</sup> H. Grigera Naón, *Report on Argentina, International Handbook on Commercial Arbitration*, P. Sanders General Editor. Supplement III, 1 & fol. (1985).

<sup>39</sup> Mayer, *supra*, note 16, n. 128 & fol., 106 & fol.

<sup>40</sup> Grigera Naón, *supra* note 36, at 25 & fol.

that every party to a controversy to be adjudicated have a fair opportunity to be heard and state his or her case.

Arbitral proceedings—national or international—fall within the scope of this public policy provision. With regard to *de iure* arbitration—in the course of which arbitrators are expected to strictly abide by the applicable rules of law governing both the substance of the dispute and the arbitral proceedings themselves—failure to meet this standard, or the fact that the arbitrator has incurred in “essential procedural error” can lead to the setting aside of the award. The same will happen if the award has been made after the deadline established therefore at the terms of reference or if it falls on issues not submitted to arbitration (art. 760 (2) Cpr.).

Arbitral proceedings where arbitrators have *ex aequo et bono* adjudicating powers (*amigables componedores*) also have to comply with due process constitutional requirements. Their awards can be also set aside if rendered after expiration of the agreed term or when they decide issues not submitted to arbitration (art. 771 Cpr.).

There also are additional grounds pertaining to general public policy reasons for challenging both *de iure* and *ex aequo et bono* awards rendered in Argentina in international cases:

1) Matters which cannot be freely settled or compromised by agreement of the parties cannot be submitted to arbitration (art. 737 Cpr.).

This provision basically refers to two hypotheses:

a) matters which on account of public policy reasons are deemed non-arbitrable (certain aspects of foreign investment law, antitrust and patent legislation, legal capacity of persons and family law, *inter alia*);

b) matters where there is exclusive jurisdiction of Argentine courts (matters where the Argentine State is a party and where, in addition, federal laws or provisions of the Argentine Constitution are applicable (art. 100 CN); questions where the exercise of sovereign powers of the State, such as the exercise of its taxing powers or the attribution or denial of nationality to individuals, are directly implicated).<sup>41</sup>

In all such cases, no arbitration—local or international—will be allowed.

Nevertheless, it is conceivable in the light of our considerations on public policy in the previous Chapters, that if an international arbitration takes place in Argentina, internal imperative or public policy norms will not necessarily apply even to the eyes of an Argentine judge called to decide on the setting aside of the

<sup>41</sup> Grigera Naón, *supra* note 36, at 3; H. Grigera Naón & J. Samtleben, *Schiedsgerichtsbarkeit in Argentinien*, 10 RIW. 728 (1983).

award.<sup>42</sup> Thus, matters which cannot be arbitrated in entirely local settings might become arbitrable in international ones.

However, concerns of national protection in certain vital aspects of Argentine economy related to international commercial and economic intercourse can also validly lead to exactly the opposite outcome and render for instance, and precisely because the controversy is an international one, non-arbitrable outside of Argentina matters which can be normally arbitrated in the Argentine territory.

2) International cases to be deemed generally arbitrable under Argentine law, but where the substance of the award goes against Argentine international public policy.

In general, it is unlikely that an Argentine judge will question the substance of the arbitral award or the results attained by the choice-of-law made by the arbitrators or the parties to the arbitrated dispute unless there is evidence (at least when the dispute arises from an international contract) that the award leads to a) a violation of general principles of morality and justice or of basic grounds of the Argentine juristic system, society and economic structure and policies; or b) a violation of foreign mandatory laws which should receive application both on account of Argentine private international law ("place of performance") and of the interests and policies underlying such laws (*fraude à la loi étrangère*); or c) a violation of Argentine mandatory laws of the Argentine "place of performance" imperatively wishing to receive international application (*fraude à la loi propre*); or d) a violation of Argentine or foreign direct rules also requiring extraterritorial application.

All these hypotheses are really different examples of violation of Argentine international public policy in the broad sense defined in the previous Chapter which might lead an Argentine judge to set aside arbitral awards rendered in Argentina when the controversy is originated in an international contract.

It is also to be borne in mind that the foregoing concerning arbitrability of disputes and operation of international public policy in connection with international commercial arbitration will not at all necessarily imply an abusive interference of Argentine judges in arbitrations held in Argentina because, as already pointed out, the interests and policies to be evaluated within the framework of entirely local transactions do not wholly coincide with those considered when international transactions are at stake. In this latter context, general concerns of predictability, fairness, fostering of international commercial and economic intercourse, reciprocity, harmony, lowering of costs,

<sup>42</sup> H. Grigera Naón. *El arbitraje comercial en América Latina*, 4 *Revista del Derecho Industrial*, 17/18.

unification of international trade law, functional coordination of mandatory norms of national origin governing international trade and economic transactions and swiftness of international economic and international transactions are to be analyzed on the same footing of specific interests and policies underlying each national mandatory substantive norms.<sup>43</sup> Thus, the application of a norm preventing the arbitrability of certain disputes in local settings, or the application of mandatory prohibitive norms for totally local transactions is not necessarily warranted in international cases when after weighing together the interests and policies underlying such provisions for entirely local cases and those pertaining to international ones it is concluded that the specificity of the international issue at stake constrains the applicability of the mandatory rule only to local transactions.

(ii) What has been generally said in (i) is also true when the validity of an arbitral clause concerning an international transaction is invoked. Nevertheless, in such instances, the invalidity of the arbitral clause is rather more likely to ensue because there is a public policy reason relevant for arbitrations in an international setting specifically forbidding arbitration in the instant case—probably expressed through *lois de police* concretely excluding international or “foreign” arbitration—than because there is a possible violation of Argentine international public policy if an arbitration were carried out under such arbitral clause.

The reason for this is that it will be very difficult—and most often impossible—to determine before the arbitration has even started if it will lead to a solution incompatible with Argentine international public policy as previously described in this paper (either as a violation of general principles of morality, justice and social or economic organization or of the fundamental mechanisms for the designation of the applicable law on which the Argentine private international law system is grounded); or that future arbitral proceedings pursuant to the questioned arbitral agreement will be carried in a way incompatible with Argentine international public policy. Only if such incompatibility appears from the arbitral clause itself or from the instructions given to the arbitrators, or from other circumstances evidenced by the contract where the arbitral clause is inserted, (such as the choice-of-law provisions to be applied by the arbitrator according to the will of the parties), can an Argentine judge deny validity and effects to an arbitral clause corresponding to an international transaction as contrary to Argentine international public policy.

<sup>43</sup> A. T. von Mehren. *Choice-of-Law and the Problem of Justice*. 41 *Law & Contemp. Probs.*, 25 & fol. (1977).

It is also relevant to point out that the average opinion of Argentine authors and court decisions do not seem to grant absolute independence to the arbitral clause from the contract where it has been inserted. Moreover, it appears to be settled that issues of inexistence of the contract containing the arbitral clause and of contractual invalidity necessarily reaching the arbitral clause cannot be settled through arbitration under such clause and are to be decided by national courts.<sup>44</sup> For this reason, there is no contrary evidence that an Argentine court will not consider the application of mandatory legal norms wishing to receive extraterritorial application belonging to the “place of performance” of the transaction submitted to arbitration for determining the validity and effects of the arbitral clause itself, as well as relevant direct rules of its own and foreign “interested” *fora*.

(iii) Arbitral awards rendered outside of Argentina will not be recognized or enforced in the country if they run against Argentine “principles of public policy” or if they decide issues which cannot be arbitrated or if the arbitral agreement covers an issue submitted to the exclusive jurisdiction of Argentine courts (arts. 517 (4), 519 bis, 737 and 1 Cpr.).

In general terms, the requirements for recognition and enforcement of foreign arbitral awards rendered in international commercial disputes are based on the same public policy and arbitrability limitations already described with regard to the powers of judges to set aside arbitral awards rendered in Argentina or to the possibility of denying recognition or validity to arbitral clauses when international commercial or economic disputes have been submitted to arbitration.

Therefore, recognition and enforcement of foreign arbitral awards violating Argentine general principles of morality and justice or Argentine social, economic and political organization and policies, or Argentine or foreign relevant direct rules, or within the framework of international contracts, substantive mandatory norms of the “place of performance” wishing to receive international or extraterritorial application to the controverted issue (*fraude à la loi*) may be refused by Argentine courts.

Nevertheless, it is to be remarked that the recognition and enforcement of foreign arbitral awards bring to bear specific policies and interests which will certainly have a moderating impact on the evaluation of the intensity to be given to the policies of the *forum* requiring the refusal of recognition or enforcement of a foreign award which has been issued in connection with a truly international case.

<sup>44</sup> Grigera Naón, *supra* note 39 at 726: note 36, at 11.

In this sense, there are general policies normally shared by the procedural law of the *forum* before which the foreign award is submitted and revealed by such institutions as *res iudicata* and the limitation of appeals or means of setting aside which can be raised against an already adjudicated matter, which must be weighed against other policies and interests of the *forum's* legal order or specific norms from which a denial of recognition or enforcement would ensue.

After such weighing exercise is made, it should not surprise if it is concluded that awards in international commercial and economic matters which might have been set aside for public policy reasons if they had been rendered in Argentina, are likely to be fully recognized and enforced in that country because already enjoying *res iudicata* effects abroad entitling the parties to the arbitrated dispute to expectations as to their reciprocal rights and obligations which would be radically and may be outrageously disturbed if the award were deprived of extraterritorial effects.<sup>45</sup> This is why art. 517 (1) and (3) Cpr. (to which internal *renvoi* is made by art. 519 bis Cpr. specifically referring to recognition and enforcement of foreign awards) requires that for its recognition and enforcement in Argentina the foreign award must have acquired *res iudicata* and be considered as such under the law of the country where it was made.

These principles of predictability and repose<sup>46</sup> concerning situations already adjudicated by final decisions will certainly induce the Argentine judge to prudently consider public policy principles under Argentine law so as not to unnecessarily disturb the expectations of the parties to an arbitral procedure and the fluidity of international commercial and economic exchanges unless there are superior national interests and policies underlying the Argentine relevant norms and principles clearly overpowering the concerns for the stability of international commercial arbitral adjudications.

<sup>45</sup> A. T. von Mehren, *Adjudicatory Jurisdiction: General theories compared and evaluated*, 63 *Boston Univ. L. Rev.*, 279 & fol.

<sup>46</sup> The principle of repose canvasses different policies involved in the recognition and enforcement of foreign adjudications, such as the avoidance of the duplication of efforts and the preservation of stability and unity in the decision-making process by diminishing the possibilities of attacking existing adjudications (foreign or local) regarding specific issues. Such policies lead within certain boundaries to sacrificing the principle of absolute correctness of the final decision, which might be better served, for instance, by authorizing a total review of the foreign award by the court where it is submitted for recognition and enforcement. As it has been said in this regard, the principle of repose: "... accepts the inherent imperfection of human knowledge and institutions and the need to put to rest quarrels and disputes so that the energies of individuals and resources of society can be devoted to more constructive tasks.": von Mehren & Trautman: *The Law of Multistate Problems*, 835, (1965); 1983 mimeographed edition: v-4 & fol.